

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

77-4115

United States Court of Appeals

FOR THE SECOND CIRCUIT

INTERCONEX INC.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION and
THE UNITED STATES OF AMERICA,

Respondents.

BRIEF OF INTERVENOR SEA-LAND SERVICE INC.

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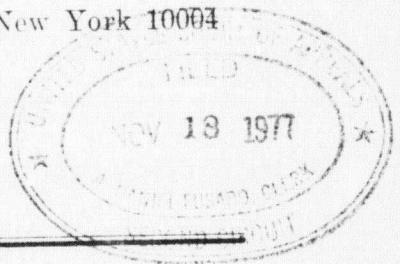
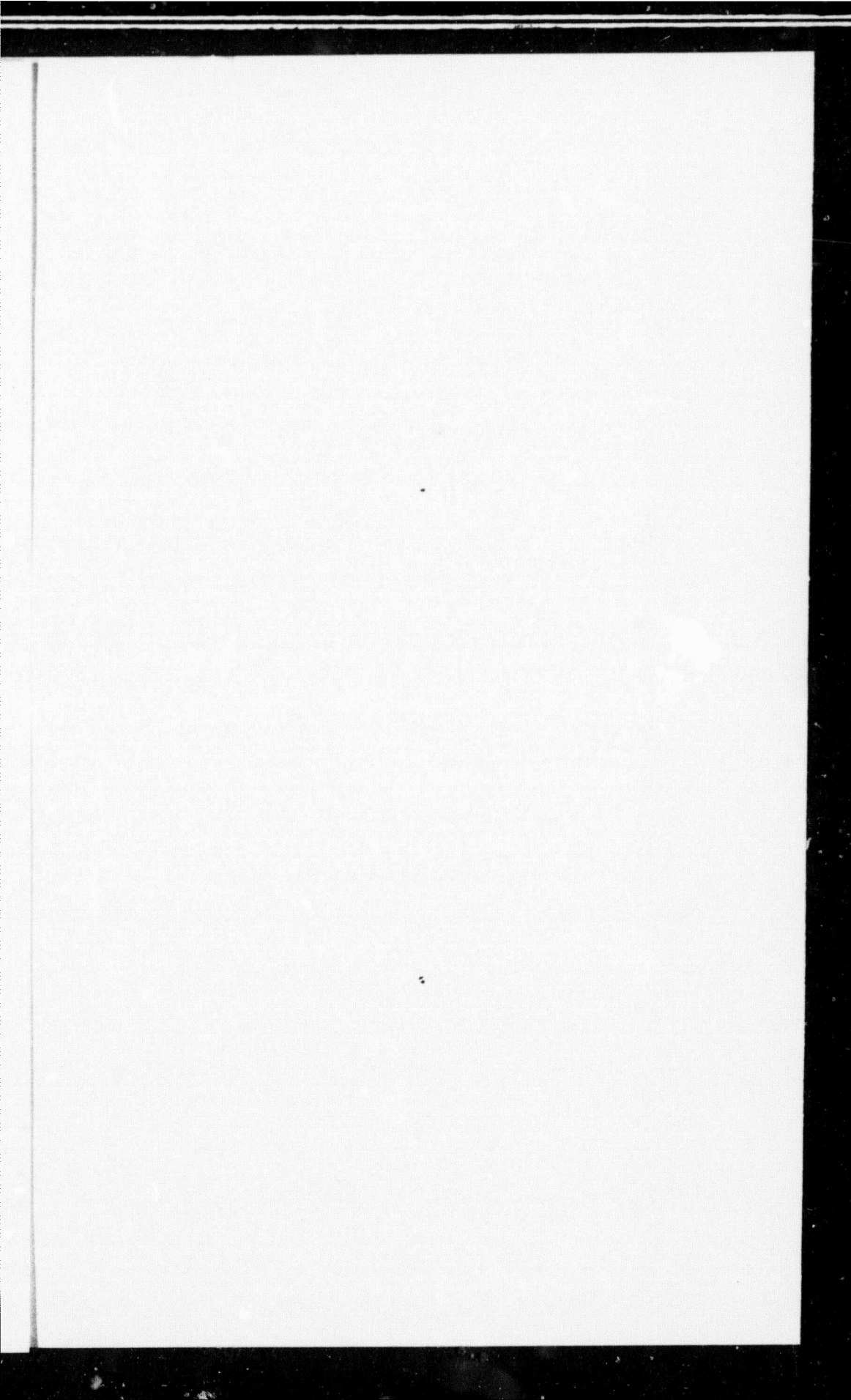


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Questions Presented for Review

Petitioner has not specified the questions presented for review as such. It poses (p. 2 of its Brief) only a "broad question" which seemingly asks this Court to reconstruct the Rules of Practice and Procedure before the Federal Maritime Commission so as to conform to petitioner's version of what they should be.

Petitioner may have refrained from setting forth particular questions for review advisedly in order to present to the Court a mournful tableau of being wronged by the Commission itself, its Secretary and Administrative Law Judge. Whatever petitioner's intentions, intervenor Sea-Land frames the following issues for this Court's consideration:

1. Whether the Federal Maritime Commission committed an abuse of discretion by adhering to its estab-

lished Rules of Practice and Procedure at all stages of the proceedings below.

a. Whether plaintiff's procedural difficulties are more of its own making rather than the action of the Commission.

2. Whether this Court's power of review of an agency determination is more than ordinarily restricted by the binding effect of the unappealed decision in Docket 75-19, the so-called Colt case.

3. Apart from procedural considerations, whether the settlement between Colt & Interconex was so subjective, secret, speculative, and complex as to negate the possibility of framing a substantive cause of action against the carriers predicated thereon.

Statement of the Case*

This brief is submitted on behalf of Sea-Land Service, Inc. in accordance with permission granted by the Court in its order of June 22, 1977 granting Sea-Land's motion for leave to intervene.

Petitioner has presented a skeletal outline of proceedings before the Commission with which intervenor Sea-

* The Court may note that the undersigned firm appeared as co-counsel for Colt on its complaint (J. App. p. 8) and thereafter in Docket 75-19. Intervenor Sea-Land appeared before the Federal Maritime Commission by its General Attorney (J. App. p. 88). While this litigation was pending Sea-Land requested this firm to recover unpaid freight charges from Interconex arising out of the foregoing shipments. Because Colt was then an adversary party to Sea-Land, the latter was advised that the undersigned could not then undertake the additional representation of Sea-Land, although no conflict existed as to Interconex. After the Colt case was settled, this firm undertook the representation of Sea-Land on this Appeal and in the related case in the District Court.

Land takes no particular issue. Petitioner has however, been highly selective in both choice of material to be presented to this Court and the emphasis which it receives. This has resulted in an unwarranted attribution of responsibility to the Federal Maritime Commission for a situation which is largely if not wholly of petitioner's own making. Intervenor will develop the foregoing more or less chronologically in its Points of Argument.

Point I is principally concerned with procedural matters while Point II involves substantive considerations as to the effect of the settlement in the Colt case Docket 75-19 on the within litigation.

POINT I

The Federal Maritime Commission Consistently Followed Its Own Rules of Practice and Procedures.

At the Least It Did Not Abuse Its Discretion.

Petitioner's Procedural Plight Was Largely One of Its Own Making.

(a) *In the Beginning.*

From the outset, petitioner has been striving mightily against the Commission's Rules with full appreciation of the problems to be encountered in so doing. These began when petitioner in its complaint (No. 75-24) attempted to engraft Rule 13(g) of the Federal Rules of Civil Procedure upon the Rules of Practice and Procedure before the Federal Maritime Commission (J. App. p. 63). This was filed on or about June 23, 1975 (J. App. p. 64). According to petitioner's brief, (p. 5) it even then recognized that there was no provision in the FMC Rules for a cross-claim and that is why it did not file one in the Colt case (Docket 75-19). Why it believed that a separate complaint "in the

nature of a cross-claim" under Rule 13(g) was an improvement on filing a cross-claim in the original proceeding is not easy to understand. Such a pleading in the original action would have at least had the earmarks of a cross-complaint under the Federal Rules, which it could not have in a separate action. In any event, we need only look as far as Rule 1 of the FRCP to discover that the Federal Rules apply in the United States District Courts. Nothing is said about their governing agency procedures as well. Correspondingly, the Rules of Practice and Procedure of the Federal Maritime Commission, 46 CFR 502.1 do not incorporate the Federal Rules of Civil Procedure.

Reinforcing petitioner's own misgivings, the Secretary of the FMC wrote to petitioner's counsel on June 26, 1975, returning the complaint with the admonition that it did not allege a violation of the Shipping Act and that the Commission had no rule similar to Rule 13(g) of the FRCP (J. App. p. 76). Thus very early on, the Secretary isolated two difficulties with petitioner's complaint:

- a. No present violation of the Act was alleged, only a contingent one; and
- b. The Commission had no provision for a cross-claim, or third party practice.*

Rather than accepting this not unexpected advice, which was to prove so prophetic, petitioner's counsel addressed a letter to the Secretary (1) challenging his authority to reject the complaint and (2) seeking to justify its sufficiency (J. App. pages 77-80). Giving petitioner the benefit of the doubt** following its vehement appeal for reconsideration,

* *Mac Millan Co. v. United Cargo Corp.*, 11 SRR 1143 (1970).

** A doubt elevated by petitioner into a positive assertion that FMC assumed the complaint was valid when filed. (p. 23, Footnote 14).

the Secretary then accepted the complaint subject to later resolution (J. App. p. 81). Had petitioner followed the sound instincts of the Secretary and not insisted upon continuing before the Commission, it might not only have evaded what it describes as a "procedural minefield" (p. 6), but spared itself the wrenching decision (pp. 6-8) which led it to adopting the "least reliable" course. (p. 7).

Instead of wrapping itself ever tighter in its own self-imposed dilemma, petitioner might well have commenced a protective action in the Southern District of New York where all three carriers are amenable to process. This could have been held in abeyance pending the resolution of the Colt litigation. So stark in its simplicity was this alternative that one might suspect that it was not available until one discovers that it was. See for example *Orleans Materials & Equipment Co. v. Isthmian Lines, Inc.*, 213 F. Supp. 325 (E.D. La. 1963). Indeed petitioner has not betrayed any embarrassment over filing a counter-claim to cover its settlement with Colt in the Southern District action where intervenor Sea-Land is seeking unpaid freight charges arising out of the same shipments.

Needless-to-say, the commencement of a separate proceeding would have had the virtue of avoiding petitioner's hand wringing over the two-year statute of limitations countdown. While not presuming to advise petitioner or its eminent counsel, and with its own analysis possibly illuminated by hindsight, it does seem to intervenor that from a tactical point of view, it would have been more prudent to commence a separate District Court action, thereby avoiding the unsettling prospect of facing in two directions before the same forum. The subject will be more fully pursued in POINT II (6) which discusses petitioner's even more profound substantive dilemma. It is sufficient at this stage to say that if petitioner's claim is

now out of season against the carriers, it is a difficulty of its own creation rather than one of administrative entrapment demanding this Court's intervention.

(b) *The Motions to Dismiss in 75-24.*

As the proceedings below wore on, all three carriers moved to dismiss the Interconex complaint in Docket 75-24. (J. App. p. 116, 134 and 139). Various grounds were asserted including one that no specific violation of the Shipping Act by a common carrier was asserted and another that the Commission's Rules of Practice did not contemplate contingent cross-claims.

In petitioner's reply to U.S. Lines' motion to dismiss, it admitted (J. App. p. 176):

"USL is correct in its assertion that the Commission's Rules of Practice and Procedure do not explicitly provide for cross-claims against co-parties. ICX, (J. App. p. 177) on the other hand, never asserted that the rules so provide."

Interconex also conceded in its reply to Sea-Land's motion to dismiss (J. App. p. 186) that its "complaint is not the usual type of complaint filed with the Commission". The acknowledged tenor of Interconex's position was that despite its full appreciation of procedural deficiencies and the novelty of its approach, it nevertheless sought to justify its complaint on grounds that the carriers had notice of what it was doing. At no time was petitioner unaware that the FMC might take its jurisdictional limitations and Rules of Practice seriously.

(c) *The Orders of the Administrative Judge in 75-24.*

Petitioner's brief (p. 9) refers to "an incredible string of orders" on the part of the Administrative Law Judge.

Here again much of petitioner's procedural discomfiture was of its own doing. The Judge noted in his August 15, 1975 order that all motions to dismiss petitioner's complaint were served July 22, 1975 (J. App. p. 246). No replies were filed within fifteen (15) days after service of the motion pursuant to 46 CFR 502.74, or by August 6, 1975. The Judge stated he completed his first Order on August 8, 1975, and sent it to the print shop on that date (J. App. p. 246). It was served August 11, 1975. As it turned out, petitioner filed its reply August 7, one day late and did not file the required number of copies with the Secretary as noted in the latter's letter to counsel on August 7, 1975 (J. App. p. 195). The presiding Judge did not receive them until August 12, 1975, or a day after he entered an Order dismissing the complaint (J. App. p. 198), agreeing that the carriers' position appeared to be "well-founded" and noting the failure of opposition.

In his August 15 Order, the Administrative Law Judge noted that he had received copies of Interconex's reply on August 12. He then decided *sua sponte* to consider replies and to reconsider his August 11 Order (J. App. p. 247). Upon doing so, he found that petitioner had failed to supply arguments sufficient to convince him that the type of claim (inadvertently designated a counter-claim rather than a cross-claim) was not supportable under the Commission's Rules of Practice and Procedure. "The Federal Maritime Commission is simply without authority to so proceed." He further found that the positions taken by the carriers stated in his earlier Order, as opposed to those taken by petition, warranted dismissal. (J. App. pp. 249-250).

We might revert here to the original letter of the Secretary of the Commission (J. App. p. 76) and the fairly uniform position of the carriers expressed in the August 11

Order (J. App. pp. 196-198) as to there being no procedure in the Federal Maritime Commission for cross-claims and none for contingent claims or those failing to allege any present violation of the Shipping Act. Well aware, by its own admissions, of the procedural infirmities inherent in its position, it becomes difficult to reconcile the dispositions of the Administrative Law Judge, with their description by petitioner as an "incredible string of orders".

Nor can it be fathomed as to why petitioner would regard the Judge's orders as appearing to be "without prejudice" (pp. 10-11). Analogizing the FMC disposition to the Federal Rules of Civil Procedure, as petitioner is wont to do, it can be seen that only a voluntary order of dismissal is without prejudice, unless otherwise stated (Rule 41(a)(2)).

Considering the multiple grounds for dismissal raised by the carriers, petitioner was not prudent in assuming the dismissal was without prejudice. Once again it seems that it was petitioner, not the Commission, that stumbled procedurally.

(d) *The Appeal to the Commission in 75-24.*

In its appeal from the decisions of the Administrative Law Judge, petitioner continued to acknowledge (J. App. p. 263):

"Since the Commission's rules do not provide for third-party procedure, ICX did not try to invoke it in the Colt case (Docket 75-19)."

Petitioner sought to buttress its arguments with something less than an appeal to reason. Thus petitioner maintained that the decision of the Administrative Law Judge evolved out of a "judicial trance" (J. App. p. 263) and repre-

sented an "unarticulated hunch" (J. App. p. 264). The same high level approach has been continued into this appeal where Judge Harris is said to have "completely washed his hands" of the *Colt v. Interconex* dispute (p. 11).

Perhaps the most significant concession in the Interconex appeal to the Commission is the statement (J. App. p. 265):

"Possibly the Colt case against ICX will be decided in a way which renders the ICX complaint moot—in which case the ICX complaint can be dismissed or withdrawn."

This very recourse as suggested by petitioner, received the endorsement of Sea-Land in its reply of September 8, 1975 to petitioner's appeal (J. App. p. 300) and was eventually adopted in so many words by the Commission (J. App. p. 390).

(e) *The Dismissal of the Colt Action 75-19.*

On September 5, 1975, the Administrative Law Judge dismissed the Colt action against Interconex (Docket 75-19) (J. App. p. 283-295). He decided that what was before him was not merely an action for reparations but a complex proceeding outside of the jurisdiction and statutory responsibility of the Commission. It was rather, more in the jurisdiction of a Court with inherent equity jurisdiction over maritime contracts, torts, etc. (J. App. p. 284). He noted that the Maritime Commission was "not a court" but an administrative agency and "as such has no inherent judicial power. It can exercise only those powers conferred upon it by Congress". Going further Judge Harris said that the Commission could not administer complete justice among all the parties as its Rules could not entertain Interconex's claim against the carriers under Docket 75-24,

nor the standing of the Government of Korea which was not a party (J. App. p. 285). He also observed that Interconex had filed a counter-claim for over a million dollars against Colt for which no provision existed in the FMC rules (J. App. p. 292-293). The Court concluded by noting (J. App. p. 292) that perhaps the interests of all parties will be served best by removing the case to a court (J. App. p. 292-294). He then dismissed both the complaint of Colt and the Interconex counter-claim against Colt.

(f) *The Significance of the Colt Dismissal and Its Impact Upon 75-24.*

Having dismissed the Colt claim and the Interconex counter-claim as being beyond the jurisdiction of the Commission, the decision of the Administrative Law Judge in the Colt case, whether correct or erroneous, became the law of that case until such time as it might be overturned on reconsideration or appeal. The time to take the appeal was extended in stages to April 26, 1976 (J. App. p. 348). On April 28, 1976, petitioner's counsel wrote the Secretary of the Commission (J. App. p. 349), noting the Administrative Law Judge's dismissal Order of September 5, 1975, and stating:

"On April 26, 1976, the deadline for appealing that order expired, without any party to the proceeding having filed an appeal."

The letter went on to inform the Secretary of the settlement between Colt and Interconex. At that point only the decision of the Law Judge remained unappealed. It then became under 46 CFR 502-227, the "decision of the Commission" and held in sum that the Commission was without jurisdiction to entertain the Colt complaint or the Interconex counter-claim against Colt. Since there was no

longer any Colt complaint before the Commission by reason of the expiration of the time within which to appeal the dismissal Order, a viable Interconex claim (even assuming that Interconex's action was not itself inherently defective) could not conceivably survive, predicated as it was on the existence of a thriving Colt claim. At this point Interconex was again procedurally remiss. The Commission could not continue a case which Interconex had based upon Colt's succeeding against it. Moreover the Commission had now effectively held it lacked jurisdiction to entertain the Colt case. Had Interconex wished to preserve the Colt claim to serve as a foundation for its own action, it should have taken other action then to suffer the decision of the Administrative Law Judge to become the binding decision of the Commission.

As the Administrative Judge pointed out, the Federal Maritime Commission is not a court and has to operate within its own rules. Petitioner consistently failed to do so at its peril and with its eyes admittedly open. The language of this Court in *Nasser v. Isthmian Steamship Co.*, 331 F. 2d. 124, 129 (1964) is perhaps appropriate here. "In a complex and litigious society procedural anarchy cannot be condoned."

Although petitioner has challenged the decision of the Commission with the same flow of rhetoric* as it employed in patronizing the Administrative Law Judge, no amount of verbiage can disguise the truth that the latter's decision holding the jurisdiction of the Commission as too circumscribed to encompass all the claims raised in the Colt case, now represents the decision of the Commission. It follows

* See for example "No amount of formalistic obfuscation * * * " (p. 16), "The Commission instead played word games * * * " (p. 16) (p. 18), "the fog of formalism" (p. 18), "retreat into the bygone days" (p. 18).

inexorably that if the Commission could not entertain the Colt case, it cannot entertain a complaint in the Interconex case which requires it to make a determination in the Colt case as a condition to recovery over against carriers—this apart from laboring under the additional disability of seeking relief outside of the Commission's Rules.

Since this Court is not in a position to review the Administrative Law Judge's decision in the Colt case, it is bound by that determination.

Intervenor's argument here is similar to the thrust of U. S. Line's motion (J. App. p. 361) to dismiss the Interconex appeal which the Commission noted in its Order (J. App. p. 390), but did not specifically act upon. Nevertheless, the Commission's rationale as to the interconex complaint being moot by reason of the settlement is so proximate to the alternative ground of being rendered moot by reason of the unappealed decision of the Administrative Law Judge in the Colt case as to obliterate any distinction between them. (See Commission's reasoning (J. App. pp. 389-390)). The Commission observed that when the Interconex complaint was dismissed, it became the decision of the Commission and further that:

"This dismissal of the underlying Colt complaint destroys the possibility of a finding of ICX liability in that proceeding which would give rise to any claim by ICX in this proceeding." (J. App. p. 390)

It is the position of Intervenor Sea-Land that this court's already limited powers of review of an administrative order* are even more confined by the binding effect of the unappealed Colt dismissal order, where the Commission effectively exercised its discretion to decline jurisdiction.

* *The Great Atlantic & Pacific Tea Company Inc. v. Federal Trade Commission*, 557 F.2d 971, 980 (2 Cir. 1977).

What is perhaps the leading case on review of Maritime Commission orders, *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620-621, discusses the various criteria employed, commenting as to discretionary matters "it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." Similarly, in a recently released opinion in *Continental Stock Transfer v. Securities and Exchange Commission*, — F. 2d — (Docket 77-4034)—Slip Opin. p. 6025, this Court observed p. 6026 that "great deference" is given by the courts to an administrative agency's "interpretation of its own rules and regulations."

Where the administrative body has declined jurisdiction over the primary action and there is to be no review of that determination, it can hardly be said that the agency abused its discretion with respect to the dependent third-party action. Nor for the same reasons could the Commission have abused its discretionary powers under 46 CFR 502.70 for not considering petitioner's non-specific request to amend its complaint, especially where even now petitioner has failed to indicate how an amendment would improve its procedural position.

(g) *Petitioner's charge that the Commission did not advise it of the effect of the settlement of 75-19 on 75-24.*

In what might be the most egregious accusation of all leveled at the Commission, petitioner complains in Footnote 11 (p. 12) that at no time did the Commission advise it that the settlement of the Colt case might effect the validity in its own complaint. Petitioner cites no authority requiring an administrative or judicial tribunal to inform the parties of its decision in advance of its issuance. If petitioner sought some insight on what might occur, it had

only to review the U.S. Lines' motion to dismiss petitioner's appeal (J. App. pp. 361-366) wherein that carrier stressed the point that petitioner's action was moot following the settlement, virtually the same position later adopted by the Commission. In opposing U.S. Lines' motion, petitioner indicated that it clearly understood what relief U.S. Lines sought, namely, the "mooting" of its appeal (J. App. pp. 379-380). Petitioner, however, disagreed and informed the Commission "that its appeal is alive and well" (J. App. p. 380), going on to argue as it does here that it was sufficient that the carriers had notice of what it was about, and seeking an amendment of its complaint. It therefore comes with poor grace for petitioner to chide the Commission for failing to inform it that the validity of its complaint was as stake when that was the precise relief sought by U. S. Lines.

(h) *The Alleged 19 Month Delay by the Commission in Reaching its Decision.*

As with many other aspects of this litigation, petitioner seeks to transfer blame for its actions and its own shortcoming to the Commission (pp. 32-33). It is alleged that the Commission by delaying its decision unreasonably brought about the expiration of the applicable two-year statute of limitations within which to seek reparations. It has been previously discussed how petitioner might have protected itself in the District Court. It would not then have found it necessary to reduce itself to assuming the role of a battered party plaintiff.

Moreover, the record gives no support to a claim of an unreasonable 19 month delay by the Commission. In its appeal filed August 25, 1975, petitioner specifically asked the Commission to maintain the case in a suspended status until the final determination of the Colt litigation. (J. App.

p. 266). There is no reason to doubt that the Commission obliged petitioner since it proved amenable to extending the time of the Colt appeal in various stages to April 26, 1976. (See J. App. pp. 340-348). On April 28, 1976, petitioner's counsel wrote the Secretary of the Commission (J. App. p. 349) advising of the Colt/Interconex settlement, and suggesting the possibility of settlement with "certain of the other parties in this proceeding." * Thereafter on July 22, 1976, petitioner moved the Commission to submit the opinion of the Court of Appeals in *Kraft Foods v. Federal Maritime Commission*, (J. App. p. 350). On August 6, 1976, respondent U.S. Lines moved to dismiss the appeal (J. App. p. 361) as moot. On August 23, 1976, petitioner replied to the U.S. Lines motion (J. App. p. 374). At this point the so-called 19 month delay by the Commission suddenly becomes a little over 7 months.**

It may also be noted that in its Reply to U.S. Lines' motion to dismiss filed with the Commission on August 23, 1976 (J. App. p. 374), petitioner did not stress the need for any urgency of decision by the Commission. Indeed most of the two year limitation period for the Sea-Land shipments between January, 1974, and February, 1975, had already expired by August 23, 1976, with only five months remaining until the final expiration date in February of 1977. The two year period had already expired by August 23, for 30 of the 49 listed shipments (J. App. pp. 10-58). Under all the circumstances, petitioner's belated cry of "foul" has a distinctly hollow ring.

* See also Footnote 1 in the Commission's Order of Dismissal (J. App. p. 387), noting settlement negotiations were going on with the carriers.

** Cf. a possible four year delay in *ITT World Communications v. FCC*, 555 F.2d 1125 (2 Cir. 1977), which this court did not condone (p. 1126) but which did not result in a reversal of the FCC ruling (p. 1128).

POINT II

Procedural Issues Aside, Petitioner Is in No Position for a Variety of Reasons to Fashion a Cause of Action Against Intervenor Sea-Land Out of Its Settlement With Colt.

Apart from procedural deficiencies, the following substantive reasons militate against the existence of any cause of action against Intervenor Sea-Land arising out of Interconex's settlement with Colt:

1. The Colt claim includes a claim for overcharges both under petitioner's tariff as an NVOCC and Sea-Land's tariff as vessel-owning common carrier. The extent to which petitioner may have apportioned its settlement to each is largely subjective.

2. In advising the Commission of the settlement, petitioner's counsel (J. App. p. 349) wrote on April 28, 1976:

"Since this settlement agreement discloses confidential relationships between Interconex and its shippers and proprietary information, we request that the agreement be granted confidential treatment, pursuant to Rule 10(aa) of the Commission's Rules of Practice and Procedure."

Further in opposing the motion of United States Lines to dismiss its appeal, petitioner stressed (J. App. p. 379, Footnote 2) that while the *existence* of the settlement was not confidential, the *terms* were.

3. It is extremely doubtful that Colt, rather than Republic of Korea, was a proper complainant in 75-19. If not, Interconex should have prevailed against Colt with a resultant dismissal of the Interconex action against the

carriers. As a result, any settlement with Colt was gratuitous on the part of Interconex. Colt, in its complaint (J. App. p. 4) acknowledged that it was the:

“duly authorized agent of the Government of the Republic of Korea, in the negotiation and performance of the transactions hereinafter alleged.”

In opposing the motions of the carriers to dismiss Colt maintained that they had (J. App. p. 202) “unjustly benefited at the Republic of Korea’s expense”. “Moreover, the burden of these overpayments fell upon Colt’s principal, the Republic of Korea” (J. App. p. 207). Finally, Colt alleged that the Republic of Korea (J. App. p. 209) “ultimately bore the cost of the overcharge.” Significantly, Interconex, in its answer to Colt’s complaint, alleged by way of defense (J. App. p. 105):

“Colt as alleged agent of the Government of Korea is not the real party in interest in this dispute.”

In *Trane Co. v. South African Marine Corp.*, 16 SRR 1497, (1976), the Administrative Law Judge noted (p. 1501) that while “any person” may file a complaint under § 22 of the Shipping Act of 1916, in order to succeed in a reparation case, “a person must show injury and proof of pecuniary loss”.

The original complaint in that action failed to state that the complainant seeking reparation was a person who had paid freight or was the valid assignee of one who had. The Judge therefore found a jurisdictional defect, noting that “the shipper-complainant named in the original complaint did not appear to have paid the freight and therefore lacked standing to seek reparation”. While this was corrected on amendment by substitution of the consignee who had paid the freight, the proposition quoted remained intact, as it

must here, where Colt was the admitted agent for the Republic of Korea, who paid the freight, and where Interconex itself raised this exact defense in its answer.

4. Petitioner rationalizes its settlement with Colt on other highly subjective factors. It states for example (p. 12) its belief that the "commission would never uphold a decision avoiding its duty to hear the merits of Colt's claim".*

Petitioner maintains that it became convinced that "some" (not otherwise described) of the cargo measurements had indeed been overstated (p. 12) despite the "careful review" of all shipments made by members of Interconex's staff conducted according to the personal direction of its President, as sworn to in the latter's affidavit (J. App. p. 237-238).

As additional, albeit unspoken, grounds realistically influencing petitioner's decision to settle, we may consider the possibility that the Commission might have eventually upheld Colt's charges of fraud, gross or reckless negligence, against petitioner with the dual implications of (a) tarnishing petitioner's reputation in the shipping community and/or (b) in the event of proven fraud, putting in jeopardy petitioner's license to do business as a freight forwarder.

Interconex having become convinced as it says (p. 12) of (1) the likelihood of reversal of the Colt dismissal and (2) the validity of Colt's claim, its apprehension over (a) and (b), supra cannot be minimized. On the other hand, intervenor Sea-Land should not be taxed because petitioner saw fit under the circumstances to bite the bullet.

* An expectation that may well have been dashed as convincingly as petitioner's forecast that its appeal herein was still "alive and well" following the Colt settlement and U.S. Lines' motion to dismiss (J. App. p. 379).

5. As petitioner indicates in its brief (p. 3), Interconex handled about 379 shipments for Colt. Of these only some 49 or 50 have to do with intervenor Sea-Land (J. App. p. 10-58). Since American Export Lines, Inc., handled but one of these shipments (J. App. p. 109), it must be concluded that U. S. Lines carried the great remainder. Petitioner and U. S. Lines have now settled (See Exhibit 1). Once again highly subjective and conjectural factors come into play involving how much of the Interconex settlement with Colt can conceivably be represented by the U. S. Lines settlement with Interconex.

6. The Colt claim against Interconex and the Interconex claim against Sea-Land are irreconcilable. If Interconex had succeeded against Colt, there admittedly would be no claim over. If Colt succeeded against Interconex, the latter is then required under its own understanding of its claim to proceed on the Colt theory of Interconex's fraud, reckless or gross negligence. Petitioner in replying to the carriers' motions to dismiss maintained:

"ICX adopted the allegations and arguments raised by Colt in Docket 75-19 and incorporated them by reference in its complaint against the underlying carriers in Docket 75-24." (J. App. p. 177)

"ICX incorporated the Colt complaint by reference, but did not charge any other violation of the Shipping Act, because it intended to charge Sea-Land with exactly the same violation charged by Colt—no more, no less." (J. App. p. 185)

Petitioner has acknowledged that it has been faced with a procedural dilemma. It has in fact involved itself in a far more difficult substantive dilemma, as the Court will appreciate when it reviews what Colt and Interconex said about each other below. It should not escape the Court's

notice that petitioner's brief vastly understates the gravity of the charges brought by Colt against it.

Colt on Interconex

In its Complaint Colt accuses (J. App. p. 6) Interconex, Inc., as stating the cubic measurements and/or weights "either fraudulently, negligently or by reason of gross negligence and recklessness." Colt did not confine its charges of fraud to the complaint. In resisting a time limitation challenge to its complaint by the carriers, Colt responded (J. App. p. 219):

"The complaint alleges (paragraph 8) that respondent Interconex *fraudulently* misstated the cubic measurements and/or calculation of weights . . ."

After repeating the alternative charge of gross negligence or reckless disregard for the facts amounting to fraud Colt said: "It is a generally recognized rule of law that where fraud is practiced, statutes of limitation are tolled." (J. App. p. 220). In its reply to Interconex' motion to dismiss, Colt argued (J. App. p. 274) that the various affidavits submitted "show that Interconex engaged in fraud or with a reckless disregard for the true facts tantamount to fraud." In opposing the time limitation raised by Interconex, Colt again argued

"that where the facts underlying a cause of action are concealed through fraud or wrongful acts amounting to fraud, the running of the applicable statute of limitations period should be tolled." (J. App. p. 279).

It is clear that Colt was making charges against Interconex far more serious than the softened version of these allegations appearing in petitioner's brief on appeal. Indeed, the word "fraud" which loomed so large in the Colt

litigation has vanished from Interconex's appellate vocabulary.

Interconex on Colt

In its answer and counterclaim Interconex urged as its first defense that with four exceptions

"the cubic measurements and weights stated by ICX in its bills of lading for the shipments in question were the same as, or less than the measurements and weights declared by or on behalf of Colt. All shipments were tendered to ICX in sealed containers. Colt was bound by its own declarations." (J. App. P. 104)

Moreover, Interconex argued that its clerks had in fact charged a *lesser* rate to Colt based on an erroneous classification of cargo and was therefore entitled to an additional \$930,053.60 in excess of the freight actually billed plus \$169,406.62 (freight withheld by Colt). The fate of petitioner's counterclaim, so positively stated in its answer, is further occasion for speculation about the settlement. If, for example, it was given any weight, then intervenor might be entitled to additional freight from petitioner.*

In its response to Sea-Land's motion to dismiss, Interconex stated (J. App. p. 187):

"ICX believes that the evidence will show that, if any measurements or weights were overstated, they were overstated by Colt. ICX and Sea-Land thus, are in the same position—they assessed freight charges at measurements and weights no greater than as supplied by their shipper and completed the transportation services required of them."

* Intervenor is contemplating an amendment to its complaint in the District Court to pursue this question further.

In its motion to dismiss the Colt complaint, Interconex buttressed the position taken in its pleadings that all weights and measurements came from Colt, that the cargo was shipped in sealed containers, and "it did not open any sealed containers to verify the measurements and weights of the cargo contained therein" (J. App. p. 229), by annexing the affidavit (J. App. p. 237-238) of its President, Jon T. Stephens, sworn to August 6, 1975. This was six months after the completion of all shipments in question and two months after commencement of litigation.

Mr. Stephens stated unequivocally that members of his staff had completed a "careful review (J. App. p. 237) of 375 of the 379 shipments." The affidavit supported Interconex' position that the weights and measurements were no greater than those declared by Colt, except for four shipments, that the cargo was packed by professional packers hired by Colt and was "always tendered to ICX in sealed containers. ICX employees never opened the sealed containers to weigh or measure the cargo." (J. App. p. 238)

Mr. Stephens went on to aver that whatever data was furnished was then included in ICX bills of lading and that during the two and one half year period in which the shipments occurred, Colt never expressed any dissatisfaction with the cargo weights and measurements.

In appealing the Administrative Law Judge's decision dismissing its complaint in Docket 75-24, Interconex reflected on the weakness of its position vis-à-vis the carriers (J. App. p. 265):

"We have found no law as to a carrier's duty to investigate and reduce a shipper's over-declaration of weight or volume of cargo tendered in sealed containers. Consequently, ICX cannot know before the Colt case (Docket 75-19) is decided whether it will

have a good claim against its underlying carriers if Colt wins its own case."

Interconex went on to concede that it had "no reason to make any *unconditional* claim against the underlying carriers unless it is held liable to Colt * * *" Needless-to-say, Interconex has not been held liable to Colt. It has settled with Colt for reasons best known to itself.

In a footnote in (J. App. p. 269) petitioner further acknowledges:

"that it would be inconsistent with ICX's position in defending the Colt complaint in Docket 75-19" to charge "that a carrier *must* correct downward its shipper's overstatement of weight or measurement, and refund freight accordingly."

Intervenor cites the foregoing to demonstrate how irreconcilable and untenable is the position of Interconex in its claim over against the carriers. In order to even present a claim over, petitioner must assume the accuracy of the Colt allegations which, as it has admitted, it adopted and incorporated in its action against the carriers. To do so, it logically admits fraud, reckless or gross negligence, which no one has charged to the carriers. Petitioner then finds itself in the unenviable role of impeaching the sworn testimony of its own president who directed his staff to conduct a "careful review" which shows that all weights and measurements were, with insignificant exceptions, exactly as declared by Colt. Despite all the foregoing petitioner insists it is entitled to be bailed out by the carrier. Given such reasoning, it is not altogether surprising that the Maritime Commission was hesitant about probing into the twilight world of the Interconex settlement with Colt.

Petitioner's request for leave to amend to assert an as yet unspecified claim against Sea-Land offers nothing more substantively than it did procedurally. Even under the Federal Rules of Civil Procedure, amendments are not permitted where the amended complaint would contain the same infirmities as the original. *DeLoach v. Woodley*, 405 F. 2d 496 (5 Cir. 1968), *Asher v. Harrington*, 461 F. 2d 890, 895-896 (7th Cir. 1972).

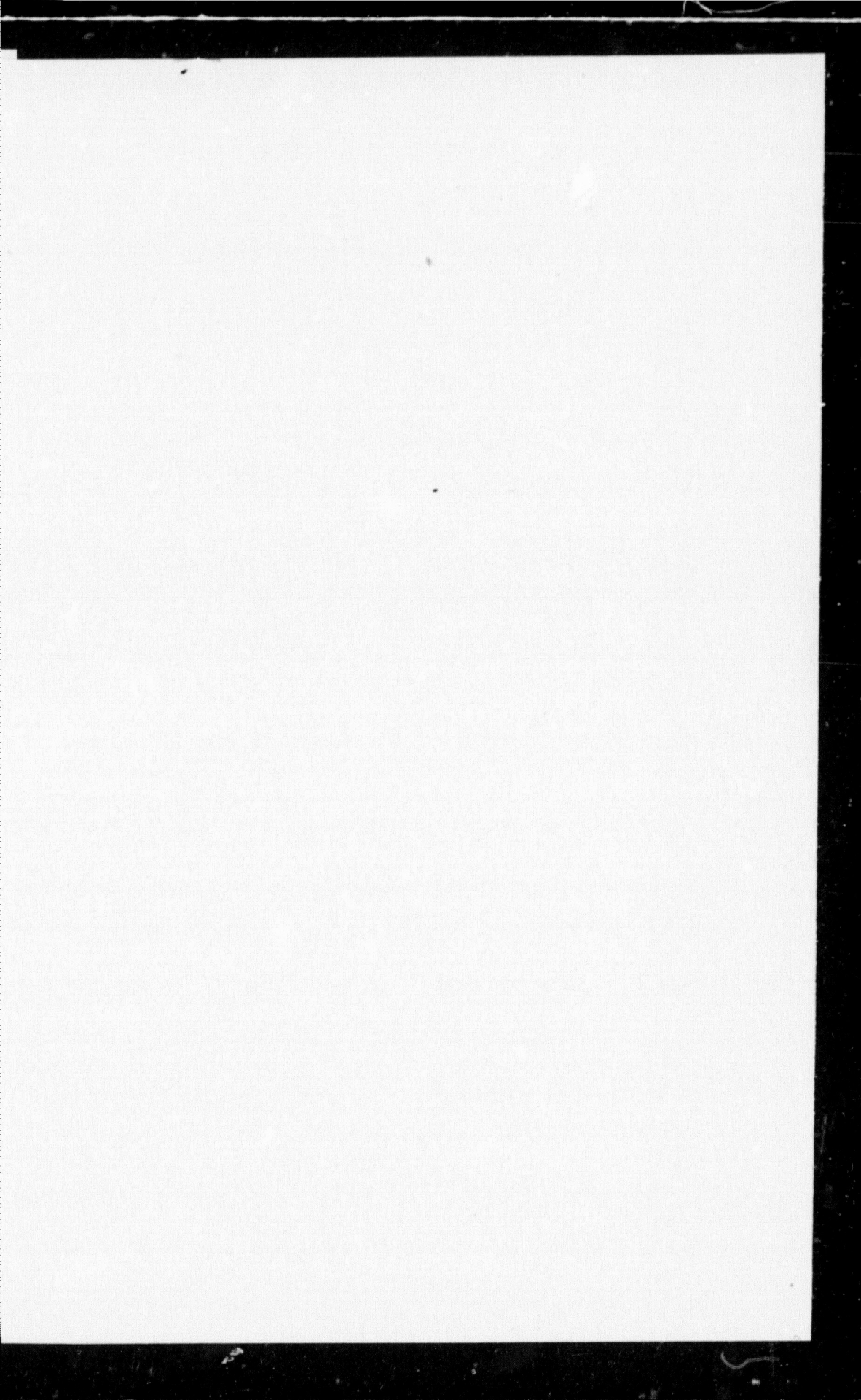
CONCLUSION

The Order of the Federal Maritime Commission Dismissing the Complaint of Interconex, Inc., Should Be Affirmed.

Respectfully submitted,

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New York, New York 10004

FRANCIS X. BYRN, ESQ.
Of Counsel



AFFIDAVIT OF MAILING

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

BENJAMIN NOSTRAMO, being duly sworn, deposes and says; that he is over 21 years of age; that on NOV 18 1877, he served a true copy of Brief of intervenor See-Found, by depositing the same, duly enclosed in a postpaid and sealed wrapper, in an official letter box duly maintained and operated by the Government of the United States of America, at One State Street Plaza, Borough of Manhattan, City of New York, and addressed to said Robert V McGeorge at Canal St 1054 31st St Wash DC, that being the address within the State designated by him on previous papers in this action, as the place where he then kept an office for the regular transaction of business, between which place there then was and now is a regular communication by mail.

Benjamin Nostramo
BENJAMIN NOSTRAMO

Sworn to before me this

18 day of Nov. , 1977

Notary Public

STANLEY GIVNER
Notary Public, State of New York
No. 24-6332230
Qualified in Kings County
Cert. filed with New York Co. Clerk
Term Expires March 31, 2011

STANLEY GIVNER
Notary Public, State of New York
No. 24-6532230
Qualified in Kings County
Cert. filed with New York Co. Clerk
Term Expires March 30, 1978

AFFIDAVIT OF MAILING

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 : ss.:
COUNTY OF NEW YORK)

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Benjamin Nostromo
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Benjamin Nostromo

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at Fed. Maritime Commission
Wash DC, that being the address within
the State designated by him on previous papers in this
action, as the place where he then kept an office for the
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Stanley Gene
Notary Public